

**UNITED STATES DISTRICT COURT  
DISTRICT OF MINNESOTA**

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In re: BAIR HUGGER FORCED AIR  
WARMING DEVICES PRODUCTS  
LIABILITY LITIGATION

MDL No. 2666 (JNE/FLN)

This Document Relates to:  
ALL ACTIONS

**Corrected Joint Agenda and Report for  
October 18, 2018 Status Conference**

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Pursuant to Pretrial Order #3, undersigned Counsel submit this Joint Agenda and Status Report for the October 18, 2018 Status Conference:

**1. Pretrial Orders and Case Schedule**

The Court suspended the deadlines in PTO #26 (Dkt. No. 1352) pending resolution of Plaintiff Axline's objections to the denial of her motion to amend. (Dkt. No. 1532.)

On October 10, Plaintiffs informed Defendants that they intend to dismiss with prejudice two of the remaining Bellwether Second cases (*Ramirez*, 17-1078, and *Henderson*, 17-3056). Both cases were Defendants' nominees. Defendants wish to discuss the overall case schedule with the Court before consenting to the dismissal of these cases.

Defendants' October 2 letter to the Court enclosed a proposed schedule for completing the work-up of the remaining six Bellwether Second cases, with one set for trial in May 2019. (Dkt. No. 1530-1.) Presently, only written discovery and collection of medical records has occurred in these cases, as provided by PTO #26. Defendants also propose, given the dwindling of the bellwether pool, that the parties should nominate an

additional group of bellwether cases from those plaintiffs with *Lexecon* waivers or who consented to trial here by identifying the District of Minnesota as the remand venue in their Short Form Complaints.

Plaintiffs propose instead that bellwether proceedings in this MDL, other than *Axline*, be stayed pending the Eighth Circuit's resolution of Plaintiffs' forthcoming appeal in *Gareis*.

Both sides also would like to meet with Judge Schultz in the near term to begin discussing ways to categorize or "bucketize" cases for further proceedings.

## **2. Plaintiff Fact Sheets ("PFSs")**

Defendants have moved to dismiss an additional set of cases based on alleged PFS deficiencies. (Dkt. No. 1538.) That motion is noticed for this status conference, and it fully incorporates cases held over from last month's status conference. As in prior months, Defendants have also addressed lists of PFS disputes to the Court as provided by PTO No. 14. Plaintiffs do not concede that cases included on these lists are in fact deficient.

## **3. Update on number and status of cases transferred into the MDL**

On October 5, 2018, there were 4,956 active federal Bair Hugger cases pending in this MDL. As of that date, 500 cases had been dismissed, either by stipulation or by Court order. Not all filed cases have been served on Defendants.

## **4. Overview of related state court proceedings**

Plaintiffs' appeal from the summary judgment order in the Minnesota state court (Ramsey County) cases is fully briefed. Oral argument has been set for November 7.

There are currently three other state court cases pending outside of Ramsey County, Minnesota:

*Acosta v. 3M and Arizant Healthcare, Inc.*, pending in the Fourth Judicial District Court, Missoula County, Montana, Case No. DV-16-769, Dept. No. 4, Plaintiffs are represented by the Rossbach Law Firm. The Acosta case was filed on September 9, 2016. 3M and Arizant still have not been served.

*Petitta v. Ray R. Trey Fulp III et al.*, pending in the District Court of Hidalgo County, Texas. Plaintiff is represented by the Garcia & Martinez Law Firm. *Petitta* was filed on November 14, 2016. Only written discovery has occurred. The hospital defendant settled. The remaining co-defendant, the Plaintiff's orthopedic surgeon treating physician, filed an interlocutory appeal after the Court denied his motion to dismiss. Discovery is automatically stayed pending disposition of the interlocutory appeal.

*Bythwood v. 3M, Arizant et al.*, pending in Jefferson County, Alabama. Plaintiff is represented by Frank O. Hanson, Jr. *Bythwood* was filed on February 15, 2017. On April 7, 2017, the Court issued an order allowing fact discovery to commence. Defendants served written discovery with a deadline of September 12. Defendants have not yet received any response. No depositions have occurred. A status conference had been scheduled for October 12, 2018 but was deferred at the parties' request.

## **5. Overview of Canadian action**

On June 22, 2016, Defendants were served with a Canadian putative class action, *Driessen v. 3M Canada Company, 3M Company, and Arizant Healthcare Inc.*, filed in Ontario Superior Court of Justice, Court File No. 16-69039. Plaintiff Driessen seeks to

represent a putative class of “[a]ll persons residing in Canada who had the 3M Bair Hugger Forced-Air Warming Device used on them during surgery.” (Driessen Cplt. ¶ 4.) Plaintiff Driessen is represented by Jeff Orenstein and Andrea Grass of the Consumer Law Group Professional Corporation in Ottawa, Ontario. Defendants have retained Canadian counsel, Tim Buckley and Kate Crawford of Borden Ladner Gervais. On August 8, 2016, Defendants filed their Notice of Intent to Defend. There has been no recent case activity.

**6. Additional pretrial orders (including, but not limited to, rules and procedures, preservation order, and protective order of confidentiality)**

As discussed above, Defendants have proposed a schedule to complete the work-up of the remaining bellwether cases. Plaintiffs propose a stay of bellwether proceedings pending resolution of their forthcoming *Gareis* appeal.

**7. Status of Discovery**

***Axline*.** Based on the agreement of Plaintiffs to dismiss their Minnesota consumer protection claims, Defendants did not take the expert deposition of Dr. William Jarvis on September 28. Defendants will re-notice Dr. Jarvis’s deposition if the Court sustains Plaintiffs’ objection to Judge Schultz’s order denying leave to amend. Defendants also stood down on the continued deposition of Dr. Lombardi, the orthopedic surgeon. Dr. Lombardi’s counsel has indicated that he will not voluntarily sit for the continued deposition permitted by Judge Schultz, and therefore Defendants will likely seek further relief from the Court if *Axline* resumes.

***Other Bellwether Second cases.*** Case-specific written discovery has been served and answered in the other six remaining Bellwether Second cases. As noted above,

Defendants continue pursue and review medical and hospital records in all cases, due to delayed responses from some medical providers.

### **8. Other Pending Motions**

Defendants' second and third motions requesting dismissal of cases for failure to comply with Pretrial Order No. 23 (Dkt. Nos. 1323, 1469) have been noticed for hearing at this status conference. In addition, as permitted by this Court's August 24, 2018 order, Defendants will renew their prior motion to dismiss in *Bellande*, 16-2700. (Dkt. No. 1440 at 5-6.) One of the five cases subject to Defendants' second motion, *Steele*, 17-1262, was dismissed by stipulation on August 2. One of the five cases subject to Defendants' third motion, *Larison*, 18-0609, was dismissed by stipulation on September 21. Defendants have agreed to defer argument on *Smith* (17-cv-2889) because plaintiff's counsel in that matter is not available.

On June 27, Plaintiffs filed a motion for new trial in *Gareis*. (Case No. 16-4187, Dkt. No. 482.) The motion is fully briefed. Defendants also filed a bill of costs following the *Gareis* verdict (Case No. 16-4187, Dkt. No. 486, 487, 495). Plaintiffs' objection to the bill of costs has been filed and Defendants have responded.

On August 14, Defendants filed a letter requesting leave to file a motion for reconsideration of the Court's order on general causation summary judgment and *Daubert*. (Dkt. No. 1428.) Plaintiffs filed a letter opposing the request. (Dkt. No. 1429.)

Plaintiffs filed a motion for suggestion of remand of the *Walton* and *Johnson* cases on September 4. (Dkt. No. 1475.) Defendants filed their opposition on September 13. (Dkt. No. 1481.) Plaintiffs also believe the time has come to discuss remand more broadly,

even beyond the motions to remand already filed on behalf of the *Walton* and *Johnson* plaintiffs. Defendants oppose any remand as premature, for the reasons stated in their September 13 submission.

On September 19, Plaintiffs filed a motion to amend PTO #23. (Dkt. No. 1517.) Defendants filed their opposition on October 3. (Dkt. No. 1533.) Plaintiffs plan to notice that motion for hearing at this status conference, unless the Court prefers to hear the motion at a later date.

On October 4, Plaintiffs filed an objection to Judge Schultz's order striking the expert report of Nathan Bushnell and supplemental expert report of Dr. Yadin David. (Dkt. No. 1544.) Defendants will file their response by October 18.

On October 5, Plaintiffs filed a motion for further consideration of Judge Schultz's orders on continued sealing in *Gareis*. (*Gareis*, No. 16-4187, Dkt. No. 512.) Defendants filed their response on October 12.

On October 10, Plaintiffs filed their objection to Judge Schultz's order denying leave to amend in *Axline*. (*Axline*, No. 17-0511, Dkt. No. 67.) Defendants will file their response by October 24.

Respectfully submitted:

Michael V. Ciresi (MN #0016949)  
Jan M. Conlin (MN #0192697)  
CIRESI CONLIN LLP  
225 S. 6th St., Suite 4600  
Minneapolis, MN 55402  
Phone: 612.361.8202  
Email: MVC@CiresiConlin.com  
JMC@CiresiConlin.com

Ben W. Gordon, Jr. (*pro hac vice*)  
LEVIN, PAPANTONIO, THOMAS,  
MITCHELL, RAFFERTY & PROCTOR,  
P.A.  
316 South Baylen Street, Suite 600  
Pensacola, FL 32502-5996  
Phone: (850) 435-7091  
Fax: (850) 435-7020  
Email: bgordon@levinlaw.com

Genevieve M. Zimmerman (MN #330292)  
MESHBESHER & SPENCE, LTD.  
1616 Park Avenue South  
Minneapolis, MN 55404  
Phone: (612) 339-9121  
Fax: (612) 339-9188  
Email: gzimmerman@meshbesh.com

**Co-Lead Counsel for Plaintiffs**

Jerry W. Blackwell (MN #0186867)  
Benjamin W. Hulse (MN #0390952)  
Mary S. Young (MN #0392781)  
BLACKWELL BURKE P.A.  
431 South Seventh Street, Suite 2500  
Minneapolis, MN 55415  
Phone: (612) 343-3200  
Fax: (612) 343-3205  
Email: blackwell@blackwellburke.com  
bhulse@blackwellburke.com  
myoung@blackwellburke.com

Lyn Peoples Pruitt  
MITCHELL WILLIAMS SELIG  
GATES & WOODYARD  
425 West Capitol Avenue, Suite 1800  
Little Rock, AR 72201-3525  
Phone: (501) 688-8869  
Fax: (501) 688-8807  
Email: lpruitt@mwlaw.com

Bridget M. Ahmann (MN # 016611x)  
FAEGRE BAKER DANIELS LLP  
2200 Wells Fargo Center  
90 South Seventh Street  
Minneapolis, MN 55402  
Phone: (612) 766-7000  
Fax: (612) 766-1600  
Email: bridget.ahmann@faegrebd.com

**Counsel for Defendants 3M Company  
and Arizant Healthcare Inc.**